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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931

No. 600

KEZIAH REED, GEORGIANA R. SIMPSON, LILLIAN M. H. REDDING, Infant, By Her Next Friend, LEWIS H. REDDING; MARGARET M. REDDING, Infant, By Her Next Friend, LEWIS H. REDDING, et al., *Petitioners,*

vs.

LORENZO ALLEN.

ANSWER OF THE RESPONDENT LORENZO ALLEN TO THE PETITION OF KEZIAH REED AND OTHERS FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

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1. This is not a matter of any *great or general importance* but it is simply an ordinary ejectment suit and affects only the parties to it.

2. On July 24, 1925, in an equity suit concerning the property here involved—petitioners and respondent being parties—the Court adjudged and decreed—

> "That the true interpretation of the aforesaid Will of the said Silas Holmes, deceased, is that upon the death of said testator's daughter Virginia Allen, without leaving child her surviving, the real estate described in the bill of complaint, of which said testator died seized and possessed, is devised to Walter Holmes, the adopted son of said Silas Holmes, and to the brother and sisters of the said Silas Holmes, or to their heirs, if deceased, in equal shares, share and share alike, per stirpes; and it appearing to the Court that the fund on deposit in the Registry of the Court as aforesaid represents the rents which have accrued from said real estate since the death of the aforesaid Virginia Allen, it is, Adjudged, ordered and decreed that the said rents be divided among the aforesaid Walter Holmes and the other defendants hereto, who are brothers and sisters of the said Silas Holmes, deceased, or heirs at law of deceased brothers and sisters of the said Silas Holmes, in equal shares, per stirpes." (R. 10, 11.)

The respondent at that time was in possession of the property and he also claimed to own it. He therefore perfected his appeal from the decree by giving a cost bond.

Armed with the said decree adjudging them to be the owners of the property, and being unwilling to await the disposition of the appeal by the Court of Appeals, the petitioners in June, 1926, brought an

action in ejectment against the respondent to eject him from the possession of the property.

They based their action of ejectment and their right to possession upon the said decree and the items of Silas Holmes' Will which it construed (R. 9).

Of course they had no other source of title.

By their ejectment action the petitioners asked the Court to execute the decree of July 24, 1925, which adjudged them to be the owners, by putting them in possession of the property, which it did. The law, of course, raising the obligation on the petitioners, upon reversal of the decree, to return to the respondent whatever he might lose through the execution of the decree by ejectment or otherwise.

NORTHWESTERN FUEL CO. v. BROCK,
139 U. S. 216

Thereafter, upon the hearing of the respondent's appeal from the said decree, the Court of Appeals decided that the respondent alone was the owner of the property and reversed the decree (R. 16).

Thereupon the equity court on May 27, 1927, made a decree by which it vacated its former decree of July 24, 1925, and adjudged the respondent to be the owner of the property pursuant to the mandate of the Court of Appeals (R. 17).

Armed with the said decree of May 27, 1927, and the decision of the Court of Appeals *adjudging him to be the owner of the property* and by reason thereof entitled to its possession, respondent filed the present ejectment suit to oust the petitioners (R. 1-3). *The decree of May 27, 1927, being his source of title.*

Instead of the petitioners returning to respondent, as required by the law, the possession of the property which they gained through the execution in ejectment of the reversed decree of July 24, 1925, the petitioners interposed, as a plea in bar, Section 1002 of the D. C. Code (R. 5-7).

Therefore the question before the Court of Appeals for decision was whether Section 1002, in view of the facts and circumstances, foreclosed the respondent from prosecuting his present ejectment suit.

To have decided that Section 1002 was a barrier to respondent's suit would have been unconscionable as it would permit petitioners to retain possession of property they do not own, never owned and were never rightfully entitled to possession of according to the decree of May 27, 1927.

Petitioners, however, do not complain that the decision is unjust or that it is not consonant with fair dealing, or even that they are wrongfully deprived by it of any rightful possession of the property. Their complaint is that the decision ignores an abstract proposition of law. (Petition, p. 5, par. 7, sub-sec. [2]).

The polar star that guided the Court of Appeals in its disposition of the case, was—

(a) The collapsed foundation (decree of July 24, 1925) supporting the judgment pled in bar.

(b) The legal duty of the petitioners to restore to respondent what he lost through the execution of the decree.

(c) The final judgment in petitioners ejectment suit was a sequel to and in aid of the decree of July 24, 1925, and was ancillary and accessory thereto and it fell with the reversal of the decree.

(d) Respondent had no evidence of his title until May 27, 1927, when the Court adjudged and declared him alone to be the owner of the property—nine months after he had been dispossessed. This fact alone justified the decision of the Court. Freeman on Judgments, Sec. 712, p. 1501, says:

> "Where a right or title comes directly in issue the parties are bound to bring forward every matter or ground which might be urged to establish or defeat it and will be estopped by the adjudication from attempting to relitigate the same right or title upon other or different evidence or ground which might have been urged in the first action. Even a new evidentiary as distinguished from a new ultimate fact, does not change the situation. *But from the rule that an adjudication affects no claims which the parties had no opportunity to litigate, it results that no judgment or decree can prejudice rights which had not accrued to either of the parties at the time of its rendition.* A decision that a right exists, or that a wrongful act has been committed, leaves the party at liberty to show at a future time that since the decision was pronounced the right has expired or the wrong has been abated. And the same is true with respect to a decision that no right or cause of action exists; *it does not bar a second action when new facts have created a right or cause of action. The fact that the same subject-matter was involved in the*

former action is wholly immaterial . . . Under no circumstances will a judgment or decree take effect upon rights not then existing . . . The estoppel of a judgment extends only to the facts as they were at the time the judgment was rendered, and to the legal rights and relations of the parties as fixed by the facts so determined; and when new facts intervene, before the second suit, furnishing a new basis for the claims and defenses of the parties respectively, the issues are no longer the same and consequently the former judgment cannot be pleaded in bar."

And in Sec. 714, p. 1507, the same author says:

"Whenever title is put in issue and adjudicated, the judgment is *res judicata* upon this issue in any subsequent action. *The effect of such an adjudication must, however, be limited to the title or right as it then stood. It is obviously not conclusive as to title and rights subsequently acquired."*

The opinion of the Court of Appeals, written by Mr. Justice Van Orsdel, being impregnable, it is here incorporated in its entirety:

"This appeal is from a judgment of the Supreme Court of the District of Columbia in an ejectment proceeding. The real estate involved in this case was part of the estate of one Silas Holmes, who died November 11, 1892. The appellant here is the testator's great grandson and next of kin, while the appellees are his brothers and sisters and the descendants of brothers and sisters.

"In 1922 litigation arose over the rents derived from the property, which called for a construc-

tion of the will. On hearing a decree was entered by the court below adjudging the present appellees entitled to the rents and profits. From that decree, the present appellant took an appeal. During the pendency of the appeal, and in the absence of a supersedeas bond, the appellees instituted an action in ejectment against the appellant wholly based on the decree then on appeal, and before the case was determined on appeal, a judgment in favor of appellees was entered, from which no appeal was taken.

"In January, 1927, this court (57 App. D. C. 78) reversed the decree of the court below and remanded the case with instructions to enter a decree in favor of the present appellant. Appellant then brought the present action in ejectment against the appellees, basing his title to the property and right to possession upon the decree entered in accordance with the mandate of this court. Appellees pleaded the former judgment in ejectment in bar. Appellant replied alleging that since the former judgment he had acquired a new and different title from that asserted in the former ejectment proceeding. Appellees demurred to the replication and the demurrer was sustained. Appellant elected to stand upon his replication and judgment was entered for the appellees. From this judgment the present appeal was prosecuted.

"There is nothing especially sacred about a judgment in ejectment, nor anything exceptional that does not apply to judgments in general. Section 1002 of the code provides as follows: 'Any final judgment rendered in an action of ejectment shall be conclusive as to the title thereby established as between the parties to the action and all persons claiming under them since

the commencement of the action.' It will be observed that this relates to final judgments. A judgment appealed from is not a final judgment. It is merely an adjudication of the inferior court, the finality of which depends upon the action of the superior court. Until the decree upon which the judgment in the first ejectment suit was based, was disposed of on appeal, it was not a final judgment and was not therefore conclusive upon the parties on the question of title. Title remained suspended pending the appeal.

"The judgment in the first ejectment proceeding was dependent entirely upon the title acquired through the decree of the Supreme Court of the District of Columbia. But that decree, on appeal, was reversed and therefore became void. It conveyed no title whatever upon which the parties could base their action for possession. As the court said in Golde Clothes Shop v. Loew's Buffalo Theatre, 236 N. Y. 465, 470: 'We are told that the defendant rested upon an order of a court. The prop was insecure, and warning was not lacking of the danger of collapse. When the order was reversed and the proceeding dismissed, rights and duties were reestablished, *inter partes,* as if no order had been made * * *.' In that case a landowner had been let into possession under a warrant in a summary proceeding and proceeded to tear down buildings and erect valuable improvements on the land pending appeal. The order was reversed and ejectment proceedings brought against the tenant. It was held that there was not even an equitable defense to the action.

"The decree based upon the mandate of this court was the first and only final decree upon

which a judgment in ejectment could be based. The first ejectment suit was merely in aid of the first decree. When that decree was reversed, 'vacated, set aside, and for nothing held,' the judgment for possession shared the fate of the decree upon which reliance was placed for title. It is elementary that when a judgment, order, or decree is set aside, a dependent judgment or proceeding based upon it for its validity shares its fate and falls with it. (4 C. J. p. 1205; Ure v. Ure, 223 Ill. 454; Dodson v. Butler, 101 Ark. 416, 420.)

"The reversal of a judgment or decree places an implied obligation on a party who has received the benefits of the erroneous judgment or decree, to make restitution to the other party for what he has lost. (U. S. v. Bank of Washington, 6 Pet. 8, 17.) It was within the power of the equity court, upon the mandate of this court, to have ordered restitution of possession in its decree. Possessing this power, it would be trifling with justice to hold that the court was without power to grant restitution in ejectment.

"The judgment is reversed with costs."

Irrespective of the reasons assigned by the Court of Appeals for its conclusion, its judgment was right and should not be disturbed, it being settled law that no final judgment *in ejectment* between the same parties and affecting the same property (as here) can prejudice rights of either party which had not accrued at the date of the prior judgment, but the prior judgment is limited solely to the rights of the parties as they existed at that time.

BARROWS v. KINDRED
4 Wall. 399

MERRYMAN v. BOURNE
9 Wall. 592, 599.

WATSON v. JONES
80 U. S. 679.

BIRD v. CROSS
123 Tenn. 419.

GORE v. GORE
101 Tenn. 620, 624.

BREON v. ROBRECHT
118 Cal. 469.

THRIFT v. DELANEY
69 Cal. 188.

FOSTER v. EVANS
51 Mo. 39.

HAWLEY v. SIMONS
102 Ill. 115, 120.

PREWITT v. WILBORN
184 Ky. 638.

FREEMAN ON JUDGMENTS
Sec. 712, p. 1501;
Sec. 714, p. 1507.

Having thus demonstrated that the case does not involve a question of *great and general importance,* that the decision is consonant with both justice and fair dealing and has the support of reputable authority, and that to have sustained the plea in bar would have been unwarranted by the law and unconscionable, it is respectfully submitted that the application should be denied.

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